Supreme Court, U.S.
FILED
JAN 27 1993
OFFICE OF THE CLERK

No. 92-1102

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

RONALD D. GRAF,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

BRIEF OF THE UNITED STATES AIR FORCE APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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January 1993

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INTEREST OF THE AMICUS CURIAE

The United States Air Force Appellate Defense Division joined as *amici curiae* on behalf of the petitioner below and urged the United States Court of Military Appeals to acknowledge the due process rights of military personnel by insisting that peacetime general courts-martial, trial and intermediate appellate judges have the protection of a fixed term of office while this case was before that court. These same concerns, as well as the need to stress the fact that fixed terms of office would entail no burden for either the Air Force or the Military Justice System in general, have led to this filing before this Honorable Court.

ARGUMENT

BECAUSE THE CURRENT AVERAGE DUTY ASSIGNMENT OF AT-WILL JUDGES TO BOTH THE TRIAL AND APPELLATE BENCHES APPROXIMATES THE LENGTH OF A FIXED TERM APPOINTMENT, PROVIDING MILITARY JUDGES WITH CONSTITUTIONALLY-REQUIRED FIXED TERMS WOULD NOT BE DISRUPTIVE TO THE MILITARY JUSTICE SYSTEM.

One of the linchpins on which the lower court's decision rests is its assertion that "[i]n reality, the Uniform Code of Military Justice (UCMJ) provides substantial independence and protection for military judges, both trial and appellate, despite their subordinate position in the military hierarchy." *United States v. Graf*, 35 M.J. 450, 463 (C.M.A. 1992). Similarly, the Court of Appeals also noted its precedent would condemn any retaliatory removal of at-will judges as a violation of the UCMJ and the constitutional guarantee of judicially independent and impartial judges. *Id.* at 465. As illustrated in the Petition, 16-22, these protections are illusory and not an efficacious substitute for fixed terms. Indeed, when one considers the rather simple manner in which trial and appellate judges could be provided with a fixed term of office, thereby preventing the chilling effect of both potential and actual pressure with regard to their judicial duties, opposition to such a measure on a fiscal or administrative basis becomes incomprehensible. It must be emphasized that courts-martial take place in a rigidly hierarchical structure, and that allowing at-will judges to preside over court-martials violates the premise that courts-martial should not only be fair, "but also appear fair to effectively further the cause of good order and discipline in the armed forces." *United States v. Berry*, 34 M.J. 83, 88 (C.M.A. 1992).

Assignments in the Air Force Judge Advocate General's Department emanate in The Professional Development Division of the Office of Judge Advocate General.

After identifying potential judges, the final selection is made by the Judge Advocate General of the Air Force. UCMJ Art. 66(a), 10 U.S.C. § 826(a) (1988). Those selected serve as judges for a regular tour of duty, as any other assigned judge advocate.[1] Providing military judges with fixed terms of office would thus be a rather simple procedure. After receiving an assignment as a military trial or appellate judge, a judge advocate would merely have to be informed, via his official orders, that his assignment as a judge was for a fixed term of years. Removal as a judge would take effect only for misconduct. This procedure is followed in similar fashion with regard to permanent change of station assignments, where the military member is informed that his assignment to a particular location is for a fixed term of years. The inviolate nature of the military judge's term of office can also be easily memorialized in a punitive regulation, in order to leave no doubt in servicemen and women's minds that the judges' in the military are truly independent and impartial.

In sum, applying fixed terms of office to military judges would not disrupt the current assignment process inasmuch as military judges currently serve as at-will judges for an average of three to five years. Providing them with a guarantee of a fixed term for that or a similar length of time would thus provide them with judicial independence without wrecking havoc with JAG personnel assignments, or "infringe on military personnel flexibility." *Graf*, 35 M.J. at 454.

Military men and women are entitled to truly independent judges. The pressures felt by military judges serving at-will is not illusory, it is all-too-sadly tangible.[2] American

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[1] Interview with the Honorable Judge Larry W. Price, Assistant Chief Trial Judge, USAF Trial Judiciary, Bolling Air Force Base, Washington D.C. (January 19, 1993.)

[2] Twenty-five percent of military judges and 24% Court of Military Review judges were aware of situations in which a judge was

servicemen and women are no less deserving of a military justice system which promotes not only the actuality of an independent judiciary, but of its perception as such, than are their allied comrades who are afforded such protections.[3] Neither the actuality nor the perception of an independent military judiciary can exist unless the Fifth Amendment constitutional guarantees of due process are respected and military judges guaranteed fixed terms of office. Reviewing this case would thus allow this Honorable Court to assess an easily-changed administrative practice which strikes at the heart of judicial integrity under the UCMJ.

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threatened with reassignment or actually reassigned due to a decision. Dep't of Defense, The Military Justice Act of 1983, Advisory Commission Report 365 (1985) (table 1). Examples of attempted interference with trial judges can be found at *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991) (Chief Trial Judge expressing concern about lenient sentences to trial judges); *United States v. Allen*, 33 M.J. 209 (C.M.A. 1991) (Deputy Judge Advocate of the Navy called Chief Judge of the Navy to express concern regarding a detailed judge's reputation as a light sentencer.)

[3] R. v. Généreux, [1992] 1 S.C.R. 259, 70 C.C.C. 3rd 1 (1992).

CONCLUSION

Fixed terms of office for the military judiciary would not be disruptive to the military justice system nor would it intrude on the needs of the armed forces. Military judges could merely be told via orders and regulation that their term of service is fixed at a certain length of time, much in the same fashion as time-on-station requirements.

Respectfully submitted,

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☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 338841 70018